July 10. 1766.

ADDITIONAL MEMORIAL

FOR

David Ruſſel writer in Edinburgh, truſtee for the creditors of James Ewart, and John Macintoſh merchant in London, purſuers,

AGAINST

John Ewart merchant in Dumfries, James Hotchkis brewer in Edinburgh, David Cleghorn and George Boyd, merchants in Edinburgh, defenders.

THE original memorial on the part of the purſuers, ſtates, with ſo much accuracy and preciſion, the facts, as well as the arguments in law, proper for your Lordſhips conſideration in judging of this caſe, that though the purſuers have had your Lordſhips allowance to preſent an additional memorial on their part, in anſwer to the additional memorial which had been exhibited on the part of the defenders, very little occurs eſſential or neceſſary to be added upon their part.

It is manifeſtly affected in the defenders, to ſay, That as

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the deed of acceptance or acceſſion by the creditors to the truſt-right is not produced, they have no acceſs to know how many of the creditors have accepted thereof.

It is a fact too notorious to admit of any diſpute, that ſoon after Ewart's ſtopping payment, there was a general meeting of the creditors, when it was agreed (the defenders only excepted) to follow joint meaſures, by acceding to the truſt-right, and ſubmitting their preferences to the arbitration of the truſtee, and to proſecute joint meaſures for ſetting aſide the diligence of thoſe few that ſtood out.

This reſolution was taken in a meeting of the creditors called by advertiſement in the Edinburgh news-papers. The deed of acceſſion and ſubmiſſion has accordingly been ſigned by ſundry of the creditors; though, if the defenders prevail in the attempts they are now making to carry off ſo great a part of the bankrupt's effects, in prejudice of all the other creditors, it will be matter of indifference whether their acceſſion is completed or not, though this is *jus tertii* to the defenders, as any one or more of their number has a title to maintain this challenge.

The argument pleaded for the defenders, if rightly underſtood, reſolves in theſe two propoſitions. 1*ſt*, That as the fraud or colluſion here charged does not fall under the expreſs words of either of the ſtatutes 1621 or 1696, whatever preference the defenders may thereby have acquired over the other creditors, the ſame is not liable to challenge. 2*dly*, They deny that there is here evidence of any fraud and colluſion between them and the bankrupt, or any intention on the bankrupt's part to give them a preference to the other creditors, or in aiding them to obtain that preference to themſelves: on the contrary, they endeavour to ſhow, that they themſelves had been cheated and defrauded by Ewart; and that down to the very period of his bankruptcy, he was endeavouring to draw them in deeper.

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The firſt of theſe is a queſtion of very general importance, and well merits your Lordſhips moſt deliberate conſideration: If any fraud that a bankrupt can be guilty of to give a partial preference, directly or indirectly, to a favoured creditor, ſhall be protected from challenge, merely becauſe it does not fall within the words of one or other of the above-mentioned ſtatutes?

Our lawyers have talked in a very different ſtyle of language. Sir George Mackenzie in particular, in his commentary on the ſtatute 1621, ſays, in expreſs words, That this is one of thoſe laws wherein the particulars, as ſpecified, are ſet down rather as examples than reſtrictions; and generally, that where the reaſon of the law is expreſſed, that that law is to be extended to all the particulars to which the reaſon expreſſed in the law can reach; and that this rule holds beyond all controverſy, in laws to obviate fraud. And he illuſtrates this by ſeveral examples, where ſuch extenſions had been made.

Suppoſing that neither the ſtatutes 1621 nor 1696 had ever paſſed into laws, is it poſſible to maintain, that no remedy would have been competent for redreſs of the moſt colluſive and partial preference given by a bankrupt to two or three of his favourite creditors, juſt upon the eve of his giving way?

If this is a wrong, it muſt have a remedy; and if the ſtatute-law has provided none, the ſovereign law of juſtice and equity will give relief.

Hitherto it has been underſtood, that the Civil law was the law of Scotland, in caſes not repugnant to either the ſtatute or conſuetudinary law of the country; and the act 1621 has a ſpecial reference to the Civil law, meaning the *lex Pauriana*, as the fountain from which the partial relief thereby enacted was taken: but from thence to infer, that no remedy is competent againſt ſuch fraud, except in the caſes provided for by the two ſtatutes above mentioned, is void of all foundation either in law or reaſon.

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So ſtanding the law, the queſtion, in point of fact, is, Whether the part which the bankrupt appears here to have acted, with reſpect to theſe defenders, was ſo partial, unfair, and colluſive, as to bring it under the deſcription of fraud, againſt which the law ought to give relief?

And as this will be beſt illuſtrated by a compariſon of Ewart's conduct with third parties, when ſet in oppoſition to the part he acted with reſpect to theſe his favourite creditors, conjunct and confident perſons, your Lordſhips have it in proof, that recently before his bankruptcy, when he muſt have known himſelf on the brink of the precipice, and in the view of that fraud which he was about to practiſe, taking advantage of the credit he had formerly eſtabliſhed with Mr Macintoſh at London, he raiſed in the ſpace of a few weeks no leſs a ſum than L. 3600 Sterling, upon bills which he drew upon Mr Macintoſh; and which he unhappily accepted before he could have any knowledge or ſuſpicion of Ewart's inſolvency.

That on the 28th March 1764, being the very day before he ſtopped, he borrowed L. 200 from Meſſ. Foggo & Galloway, under the falſe pretence of expecting remittances, promiſing to repay it next day.

That, of ſame date, he took up L. 300 from Archibald Stewart merchant in Edinburgh, upon diſcounting of bills, to replace the like ſum which he had borrowed from one of the tellers of the bank. How he diſpoſed of theſe large ſums, other than the laſt mentioned L. 300, is to this hour a myſtery, of which no diſcovery has been made; and when to this is joined his ſtopping payment the very next day, the intention of fraud upon his part is clear as ſunſhine.

This point being eſtabliſhed, your Lordſhips will next caſt your eye upon the oppoſite conduct with reſpect to theſe defenders, the one his brother-in-law, the other his ſureties to the bank.

Ewart

Ewart in his judicial declaration has confeſſed, that having met with Boyd, to whom he was owing L. 220, he diſcloſed to him his being in ſuch a ſituation as obliged him to ſtop payment; ſo that the only thing he could do for him was, to indorſe him certain bills; and accordingly indorſed and delivered him bills to the extent of L. 260; and that he neither retired the ground of debt, nor took any receipt or obligation from Boyd for the bills ſo indorſed.

Boyd confeſſes, that about two hours after he had called at Ewart's houſe, and had been told by his wife of the ſtraits he was under, he was ſent for to Ewart's houſe, when Ewart indorſed him the above-mentioned bills to the amount of L. 280; that he gave no acknowledgment to Ewart for the bills ſo indorſed, nor any diſcharge of the debts due to him by Ewart; and that thereupon Ewart immediately withdrew, with this remarkable expreſſion, That *there were ſo many demands upon him.*

Here then your Lordſhips perceive undeniable evidence, by the confeſſion both of Ewart and Boyd, that double ſecurity was granted to Boyd for the debt which his brother-in-law owed him, without any receipt or other declaration whereby to aſcertain, that theſe bills had only been indorſed in ſecurity. The indorſation to the bills preſumed immediate value to have been paid for them; and as Boyd had it thereby in his power to retain theſe indorſed bills as his abſolute property, Boyd's death, or the accident of his inſolvency, before diſcovery of the fraud, muſt have rendered theſe bills the property of Boyd attachable by his creditors. And every circumſtance concurs to ſhow, that when Boyd accepted of this double ſecurity, he muſt have known, that his brother-in-law, ſo conjunct and confident a perſon, was upon the point of giving way; which therefore ſpeaks out an intentional fraud, both on the part of Ewart and Boyd.

And though the effects of this intended fraud was fruſtrated,

by Ewart's being rendered a notour bankrupt ſo recently after the indorſation of theſe bills, he ſtill profited ſo far of that fraud, that having, by means thereof, received intelligence of the debts due to the bankrupt by the accepters of thoſe bills, he was enabled to make good his partial preference by the arreſtments he uſed in the hands of thoſe debtors; as it will not be credited, upon his bare aſſertion, that he had *aliunde* knowledge of theſe particular debts due to Ewart.

Similar to this was his conduct with reſpect to the other defenders, to whom he meant to give the like partial preference. He went in queſt of Hotchkis about ten of the morning of the 29th; diſcloſed to him, that of neceſſity he muſt now ſtop payment; tryſted him and Cleghorn to meet him at his houſe at Stockbridge; where, after concerting meaſures for collecting his ſtock of wines, and Hotchkis inſiſting that he ſhould alſo acquaint him where his other effects were, he gave information of the debts due to him by different perſons, of whoſe names and ſums Hotchkis took a note in writing; whereupon he and Cleghorn forthwith proceeded in taking out an admiral-precept, in their own names, and in name of their co-obligant John Ewart merchant in Dumfries, and laid on arreſtments in the hands of thoſe very perſons of whoſe debts he had got information from Ewart; and Ewart fairly confeſſes, what, without ſuch confeſſion, would have been ſelf-evident, *viz.* That he did underſtand the purpoſe of *then* demanding the notes of his debtors names and ſums, to have been to enable them to proceed in diligence.

Hotchkis confeſſes his demanding and receiving this information from Ewart; and his taking down in writing the debtors and ſums thus diſcovered to him by Ewart; of which he exhibits a liſt, to the amount of between L. 3000 and L. 4000 Sterling.

The tale that Hotchkis tells, that he had *aliunde* knowledge of ſome of theſe debts due to Ewart, can gain no credit. Had

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that been true, what occaſion had he to take a note in writing, both of the debtors names and ſums? And as he confeſſes, that by means thereof he got intelligence of ſome debts of which he had formerly no knowledge, it is ſubmitted to your Lordſhips, if this does not furniſh irreſiſtible evidence of the intentional fraud, both on the part of Ewart, and the whole of theſe defenders, with whom he thus colluded, either directly to give them, or to furniſh them the means of acquiring a preference to themſelves.

It will not vary the caſe, ſuppoſing it to be true, that upon former occaſions Ewart had dealt deceitfully with them. That he ſhould endeavour to fill his hands with money from all quarters, to ſtave off the evil day as long as poſſible, is matter of no ſurpriſe; but when he found that he muſt go, and that the critical moment approached, then was the time to play his tricks, by giving a partial preference to thoſe particular creditors he meant to favour. If the law of this country can give no relief in caſes of this nature, it muſt be ſtrangely defective; but the purſuers are hopeful, that the law of this country is not ſo lame.

In reſpect whereof, &c.

ALEX. LOCKHART.